48A C.J.S. Judges § 334

Corpus Juris Secundum | September 2023 Update

Judges
Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

IX. Disqualification to Act

D. Objections to Judge and Proceedings Thereon

3. Determination of Objection to Judge

§ 334. Review of decision on disqualification application

Topic Summary | References | Correlation Table

West's Key Number Digest

West's Key Number Digest, Judges 51(4)

The decision of a trial court on an application for disqualification is not conclusive and may be reviewed with respect to the timeliness of the application and the legal sufficiency of the affidavit.

The decision of the trial court on an application or affidavit for disqualification is not conclusive[1] although an order denying a motion for change of judge which is within the jurisdiction of the court is not subject to collateral attack in an appellate court.[2] Thus, the decision of the trial judge is subject to review[3] with respect to the timeliness of the application[4] and the legal sufficiency of the application.[5] The remedy for review may take the form of an appeal[6] although it has been held that mandamus or prohibition, and not appeal, is the proper remedy.[7] A writ in the nature of mandamus is the proper remedy where the judge fails to rule on the application,[8] and it has been stated that, considering the mandatory nature of a disqualification statute, mandamus is the proper remedy for the failure of the trial judge to disqualify himself or herself.[9] Ordinarily, a court will not review the denial of a disqualification motion, which is an interlocutory order, in an original proceeding where adequate review is otherwise provided.[10]

Other parties do not have standing in the reviewing court to question the failure of a judge to disqualify himself or herself because of personal bias and prejudice toward one particular party.[11] The judge of an appellate court must decide whether recusal is required in a case in which a party claims judicial bias.[12]

Whether a trial judge is disqualified is a question of law where the facts alleged are undisputed,[13] and declarations of the trial judge attesting to the judge's lack of prejudice are deemed true on review.[14] Where no evidence has been introduced to support the charge of disqualification, the reviewing court is limited to the averments of fact in the petition.[15]

A reviewing court must make an independent determination as to whether the affidavit asserts facts from which a fair and reasonable mind might infer personal prejudice.[16] Ordinarily, however, the reviewing court must accept the statements in an affidavit as true,[17] and it may not review the truth of the facts stated in the affidavits, counter-affidavits, or motions submitted below.[18] Nonetheless, when a trial judge by his or her own action has injected additional facts into the record, a reviewing court should put aside its customary reluctance to go beyond the face of the affidavit in determining whether the trial judge acted properly in declining to recuse.[19] It is incumbent upon the party complaining of the denial of a motion for change of judge to show a clear abuse of discretion.[20]

According to some authority, a decision on a motion to recuse is subject to de novo review.[21] Other authority is to the contrary,[22] holding that the decision of the trial judge will not be disturbed by the reviewing court unless it constitutes an abuse of discretion[23] or is clearly erroneous[24] although the reviewing court will set aside an erroneous denial of an application.[25] The failure to rule on the sufficiency of an affidavit is not reversible error where the affidavit is clearly insufficient as a matter of law.[26] However, the improper denial of a petition for substitution of judge,[27] or the conducting of the hearing on the application before the prospective jurors,[28] constitutes reversible error. Generally, the ruling will be affirmed on appeal unless the record establishes bias and prejudice as a matter of law.[29]

CUMULATIVE SUPPLEMENT

Cases:

Court of Appeals reviews a district court's decision not to recuse itself for abuse of discretion. United States v. Rechnitz, 75 F.4th 131 (2d Cir. 2023).

Review of a denied motion for recusal of a judge based on the general appearance of partiality or specific criteria demonstrating bias may be through appeal of the final judgment. 28 U.S.C.A. §§ 455(a), 455(b). In re Gibson, 950 F.3d 919 (7th Cir. 2019).

Trial judge, by suggesting that trustee was present at hearing at which trustee claimed he had not been present, did not exceed proper scope of inquiry in ruling on trustee's motion to disqualify judge, in action in which trustee was removed as trustee of trust; judge made no attempt to refute trustee's charges of bias, prejudice, or partiality. West's F.S.A. § 38.10; West's F.S.A. R.Jud.Admin.Rule 2.330(f). Pilkington v. Pilkington, 182 So. 3d 776 (Fla. 5th DCA 2015).

The person seeking recusal of a judge bears a heavy burden to overcome the presumption of impartiality. Bishop v. State, 218 Md. App. 472, 98 A.3d 317 (2014).

Trial court acted within its discretion in denying claimants' motion for recusal, in their adverse possession action, since claims of bias or prejudice were based, in part, on alleged remarks by court that were not set forth on the record, and which remarks court denied having made, and with respect to claimants' other contentions of court's alleged bias or prejudice, they failed to establish that any alleged bias or prejudice by court affected its ultimate determinations. Oppedisano v. Arnold, 143 A.D.3d 873, 39 N.Y.S.3d 499 (2d Dep't 2016).

[END OF SUPPLEMENT]

Footnotes

1 Ala.—Medlin v. Taylor, 101 Ala. 239, 13 So. 310 (1893).

2 U.S.—In re Rury, 21 F.2d 881 (C.C.A. 9th Cir. 1927).

3 U.S.—Kinnear-Weed Corp. v. Humble Oil & Refining Co., 324 F. Supp. 1371 (S.D. Tex. 1969), judgment aff'd, 441 F.2d 631 (5th Cir. 1971).

Kan.—Hulme v. Woleslagel, 208 Kan. 385, 493 P.2d 541 (1972).

Ky.—Cross v. Wilson, 325 S.W.2d 309 (Ky. 1959).

4 Colo.—People v. District Court In and For Third Judicial Dist., 192 Colo. 503, 560 P.2d 828 (1977).

5 Colo.—People v. District Court In and For Third Judicial Dist., 192 Colo. 503, 560 P.2d 828 (1977).

Fla.—Gregory v. State, 118 So. 3d 770 (Fla. 2013).

Kan.—Hulme v. Woleslagel, 208 Kan. 385, 493 P.2d 541 (1972).

6 Ala.—Medlin v. Taylor, 101 Ala. 239, 13 So. 310 (1893).

7 Fla.—State v. Sarasota County, 118 Fla. 629, 159 So. 797 (1935).

Minn.—Payne v. Lee, 222 Minn. 269, 24 N.W.2d 259 (1946).

No prohibition nor mandamus prior to motion to recuse
Ark.—Stilley v. Perry, 372 Ark. 259, 273 S.W.3d 492 (2008).

8 Colo.—City of Trinidad v. District Court In and For Las Animas County, 196 Colo. 106, 581 P.2d 304 (1978).

9 U.S.—SCA Services, Inc. v. Morgan, 557 F.2d 110, 40 A.L.R. Fed. 942 (7th Cir. 1977).

10 Ky.—Jake's Fork Coal Co. v. Wells, 362 S.W.2d 728 (Ky. 1962).

11 U.S.—U.S. v. Hoffa, 382 F.2d 856 (6th Cir. 1967).

12 Minn.—State ex rel. Wild v. Otis, 257 N.W.2d 361 (Minn. 1977).

13 Cal.—Chastain v. Superior Court of Sacramento County, 14 Cal. App. 2d 97, 57 P.2d 982 (3d Dist. 1936).

Wis.—Goodman v. Wisconsin Elec. Power Co., 248 Wis. 52, 20 N.W.2d 553, 162 A.L.R. 649 (1945).

14 Cal.—Dietrich v. Litton Industries, Inc., 12 Cal. App. 3d 704, 90 Cal. Rptr. 856 (2d Dist. 1970).

15 Pa.—Appeal of Askounes, 144 Pa. Super. 293, 19 A.2d 846 (1941).

Insufficient matter for appellate court
Where a party alleging bias of the trial judge does not meet burden of showing grounds for bias by legal proof or affidavit but merely rests upon an allegation, there is insufficient matter for review by the appellate court.

Ala.—Parsons v. Parsons, 337 So. 2d 765 (Ala. Civ. App. 1976).

16 U.S.—Davis v. Board of School Com'rs of Mobile County, 517 F.2d 1044, 21 Fed. R. Serv. 2d 763 (5th Cir. 1975).

D.C.—Matter of Evans, 411 A.2d 984 (D.C. 1980).

17 U.S.—U.S. v. Dodge, 538 F.2d 770 (8th Cir. 1976), and Escamilla v. U.S., 429 U.S. 1099, 97 S. Ct. 1119, 51 L. Ed. 2d 547 (1977), and Alvarado v. U.S., 429 U.S. 1099, 97 S. Ct. 1119, 51 L. Ed. 2d 547 (1977).

Colo.—People v. District Court In and For Third Judicial Dist., 192 Colo. 503, 560 P.2d 828 (1977).

18 Colo.—People v. District Court In and For Third Judicial Dist., 192 Colo. 503, 560 P.2d 828 (1977).

Mo.—State ex rel. McNary v. Jones, 472 S.W.2d 637 (Mo. Ct. App. 1971).

19 D.C.—Matter of Evans, 411 A.2d 984 (D.C. 1980).

20 Ind.—Cade v. State, 264 Ind. 569, 348 N.E.2d 394 (1976).

21 Ga.—Mayor & Aldermen of City of Savannah v. Batson-Cook Co., 291 Ga. 114, 728 S.E.2d 189 (2012).

On question of legal sufficiency
Fla.—Gregory v. State, 118 So. 3d 770 (Fla. 2013).

22 **Examination of facts required; de novo review inappropriate**
N.M.—State v. Riordan, 2009-NMSC-022, 146 N.M. 281, 209 P.3d 773 (2009).

23 U.S.—U.S. v. Dehghani, 550 F.3d 716 (8th Cir. 2008).

Ark.—City of Little Rock v. Nerhan, 2013 Ark. App. 672, 2013 WL 6001923 (2013).

Colo.—People ex rel. A.E.L., 181 P.3d 1186 (Colo. App. 2008).

Ill.—In re S.D., 2011 IL App (3d) 110184, 352 Ill. Dec. 784, 954 N.E.2d 867 (App. Ct. 3d Dist. 2011).

Minn.—Hooper v. State, 838 N.W.2d 775 (Minn. 2013).

Appearance of bias
An abuse of discretion in denying a motion for disqualification of judge based on the appearance of bias will be found only if a reasonable reading of the record fails to support the conclusion that the judge's impartiality was not subject to question.

U.S.—In re Bulger, 710 F.3d 42 (1st Cir. 2013).

24 U.S.—Williams v. Illinois, 737 F.3d 473 (7th Cir. 2013).

25 Minn.—State v. Dailey, 284 Minn. 212, 169 N.W.2d 746 (1969).

Denial of due process
U.S.—U.S. v. Sciuto, 531 F.2d 842 (7th Cir. 1976).

26 U.S.—Hepperle v. Johnston, 590 F.2d 609 (5th Cir. 1979).

27 Ill.—People v. Arnold, 76 Ill. App. 2d 269, 222 N.E.2d 160 (1st Dist. 1966).

28 **Inadmissible evidence**
The conducting of a hearing the purpose of which was to ascertain the cause for a motion for substitution of a judge in a criminal prosecution, and in which most of evidence adduced would be inadmissible in the trial of the case, before prospective jurors was reversible error.

Ill.—People v. Evans, 1 Ill. App. 3d 158, 273 N.E.2d 71 (4th Dist. 1971).

29 Neb.—Kennedy v. Kennedy, 205 Neb. 363, 287 N.W.2d 694 (1980).

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